

Lawyering Beyond State Lines A talk with Sarah McShea

I. What Is the Practice of Law?

A. Multi-jurisdictional Practice

1. Lawyers are admitted on a jurisdiction-by-jurisdiction basis.
2. Increasingly, clients are engaged in business across state lines. Lawyers may be called to represent clients outside of their admitted jurisdiction.
3. States have a well-recognized interest in regulating law practice within their jurisdiction, to uphold the integrity of the state's judicial system and ensure their citizens receive the competent representation. Each state maintains its own professional and ethical standards for law practice.
4. Lawyers engaged in multijurisdictional practice, i.e. law practice in a state by an out-of-state lawyer licensed in a different home state, may not violate the host state's unauthorized practice of law regulations.
5. Multijurisdictional practice is generally facilitated by the professional responsibility rules of each state.

B. Law-related services

1. A license to practice law entitles a lawyer to hold herself out as a lawyer, to appear in court on behalf of a client, to provide legal advice, and to enter into lawyer-client relationship.
 - a. *“As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.”* (ABA Model Rules of Professional Conduct, Preamble and Scope Para 2)¹
2. Model Rule 5.7 define “law-related services” as:
 - a. *“Services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.”* See Appendix A.

¹ABA Model Rules of Professional Conduct, Preamble and Scope Para 2:
http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

- b. E.g. when a lawyer advises a client on a certain tax matter, she is considered to be providing legal services. This, despite the fact an accountant may give the same advice and would not be providing legal services.
- c. E.g. a lawyer drafting an agreement is engaging in the practice law. A business professional drafting the same agreement for her own use is not engaging in the practice of law.

II. Lawyers Practicing Outside their Jurisdiction

A. The Unauthorized Practice of Law

1. In most states, unauthorized practice of law rules prohibit nonlawyers not admitted to practice in any jurisdiction from practicing law in that state. An unauthorized practice of law violation may be a misdemeanor or felony depending on the jurisdiction.
2. Lawyers must consider whether they are practicing law when they undertake certain tasks outside the jurisdiction in which they are admitted.
 - a. E.g. may a lawyer admitted in New York advise clients, draft agreements and emails relating to her practice from her home office in New Jersey?
3. Model Rule 5.5(b) provides that a lawyer not admitted in a jurisdiction shall not (unless authorized by the model Rules or another law) establish an office or continuous presence in the jurisdiction for the practice of law or hold out to the public that she are admitted in that jurisdiction. *See Appendix B.*
4. *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998).²
 - a. A New York based law firm and its client entered into a fee agreement to be governed by the laws of California. The firm worked on the matter both in New York and in California, where meetings, negotiations, and preparation for private arbitration proceedings occurred.
 - b. After a breakdown of the relationship between the firm and its client, the client sued the firm for malpractice, alleging that it had engaged in the unauthorized practice of law, and refused to pay its bill.
 - c. The California Superior Court agreed with the client, holding that the law firm had engaged in the unauthorized practice of law in violation of California Business and Professions Code § 6125.
 - d. The Court found that out-of-state lawyers without California licenses engage in the unauthorized practice of law when they participate in

² *Birbrower, Montalbano, Condon & Frank, P.C. v Superior Court* 17 Cal. 4th 119, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998). <http://law.justia.com/cases/california/supreme-court/4th/17/119.html>

- “sufficient activities in the state” or create “continuing relationships with the California client that included legal duties and obligations.”
- e. For services illegally rendered in California, the fee agreement was found to be unenforceable.
5. California has since adopted Rule 9.43 providing for the appearance of out-of-state counsel in arbitrations.³
 6. Activities of other lawyers
 - a. Lawyers may engage in the unauthorized practice of law by facilitating or failing to limit through supervision the activities of an unlicensed lawyer.
 - b. *Office of Disciplinary Counsel v Pavlik*⁴
 - i. A partner of a firm was found to be guilty of facilitating the unauthorized practice of law by an attorney not admitted in in Ohio. The partner introduced the attorney to the firm’s clients and allowed him to use the firm’s letterhead without informing the clients he was not licensed in Ohio.
 - ii. The Court found that the duty to ensure the attorney did not engage in the unauthorized practice of law was violated despite the failures arising more out of ‘neglect by omission’ as opposed to affirmative, deceitful conduct.
- B. Practice on a temporary basis
1. Most states permit lawyers not admitted in that state to practice on a temporary basis. *See Model Rule 5.5(c) Appendix B.*
 2. A New York lawyer, for example, would be permitted to come to New Jersey on a temporary basis, as provided by the New Jersey Disciplinary Rules of Professional Conduct, RPC 5.5(b). *See Appendix C.*
 3. Official Comment [6] on Model Rule 5.5 states that there is no single test to determine whether a lawyer’s services are provided on a “temporary basis.” Services may be “temporary” even though the lawyer provides services in this jurisdiction on a recurring basis or for an extended period of time when the lawyer is representing a client in a single lengthy negotiation or litigation.⁵
 4. With respect to physical location, a New York lawyer for example could remain in New York and advise on California law, limited only by that lawyer’s ability to provide competent advice.

³ California Rule of Court 9.43: http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_43

⁴ *Office of Disciplinary Counsel v Pavlik*, 732 N.E.2d 985 (Ohio 2000):
<https://casetext.com/case/disciplinary-counsel-v-pavlik>

⁵ ABA Model Rule 5.5(b):
http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law/comment_on_rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law.html

C. *Pro hac vice* appearances

1. A lawyer may make a *pro hac vice* application, seeking permission to appear “for the matter.” In most cases, a court will grant this application, placing value on a client’s right to choose their counsel.
 - a. Following *Birbrower*, California has since adopted Rule 9.40 under the California Rules of Court permitting counsel to make an application to appear *pro hac vice*⁶ and Rule 9.44 permitting the registration of Foreign Legal Consultants.⁷
2. A court may, however, impose conditions on that appearance, requiring:
 - a. That the lawyer retain local counsel, and
 - b. Limit the number of *pro hac vice* appearances by the lawyer.
3. The lawyer must be in good standing in her own jurisdiction and agree to be bound by the local rules of professional conduct.
4. What happens when a lawyer is retained prior to a complaint being filed to do pre-litigation investigation?
 - a. The temporary practice rules in most jurisdictions require the association of local counsel who agrees to be responsible for the matter and for the visiting lawyer.
 - b. The extent of the local counsel’s participation depends on the nature of the matter and the client’s wishes.
 - c. For transactional work, the association of local counsel is less common.
5. Attorney-client privilege if lawyer erroneously believes she is engaging in authorized practice of law:
 - a. *Gucci America, Inc v Guess, Inc?, Inc.*⁸
 - i. During depositions, the parties discovered that Gucci America’s Director of Legal and Real Estate was an inactive member of the California bar and had been so for many years. Guess, Inc. demanded production of emails involving the director. Gucci denied the request, citing attorney-client privilege.
 - ii. The Court, applying the “reasonable belief” test, found Gucci had demonstrated it had reasonable belief that the director was its attorney when it communicated with him in the course of his employment as in-house counsel.
 - b. Best practice for in-house counsel is to maintain an active law license in the state in which they work or to otherwise register as in-house counsel if the state has such rule.

⁶ California Rule of Court 9.40: http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_40

⁷ California Rule of Court 9.44: http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_44.

⁸ *Gucci America, Inc v Guess, Inc?, Inc.*, 858 F.Supp.2d 250 (S.D.N.Y. 2012): <https://casetext.com/case/gucci-am-inc-v-guess-inc-5>

III. Relocating Lawyers

A. Foreign lawyers

1. Some jurisdictions such as New York⁹ and California¹⁰ provide for the admission of foreign lawyers. A lawyer who is in good standing of a recognized legal profession in a foreign country and complies with certain requirements can be registered or licensed to practice as a foreign legal consultant.
2. Foreign legal consultants will still be subject to the local Bar and Courts.

B. Temporary practice pending admission

1. In 2012, the ABA adopted the Model Rule on Practice Pending Admission which allows a lawyer licensed in another state and have engaged in active practice for 3 of the last 5 years to practice law in a new jurisdiction for up to 365 days, provided the lawyer meets certain conditions.
2. The conditions include:
 - a. Good standing in all jurisdictions in which lawyer is admitted;
 - b. No history of denial of admission in the state or failure of the bar exam;
 - c. Notifying the relevant disciplinary and admissions authorities of the state of intent to practice pursuant to the rule;
 - d. Completes the application for admission, where by motion or by examination;
 - e. Associate with another lawyer admitted in that state;
 - f. Disclose to all clients in all communications her limited practice authority in the state.
3. Some jurisdictions, like D.C., have adopted versions of the Model Rule.

C. Holding oneself out as a lawyer in new jurisdiction

1. Lawyers should ensure they are not holding themselves out as licensed to practice in a certain jurisdiction if in fact they are not yet admitted in that state.
2. Email signatures, letterheads, and business cards must accurately and relevantly describe where the lawyer is licensed or is not licensed to practice:
3. Client communications should not create a misimpression of admission.
4. Certain activities are not permitted without admission.
 - a. In New York, lawyers that are not admitted in New York (and without pro hac vice status) may not appear in court. See § 520.11(d)(5) Rules of the Court of Appeals.

⁹ 22 NYCRR 521.1:

[https://govt.westlaw.com/nycrr/Document/I51325d8fcd1711dda432a117e6e0f345?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/nycrr/Document/I51325d8fcd1711dda432a117e6e0f345?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))

¹⁰ California Rule of Court 9.44: http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_44

- b. Lawyers admitted to New York on a *pro hac vice* basis must be supervised by a New York admitted attorney. See § 520.11(c)(1)(a) Rules of the Court of Appeals.

D. In-house counsel

1. In-house counsel are engaged in the practice of law even though they are employees of a non-legal corporation. In-house counsel are subject to the same ethical obligations as other lawyers.
2. Best practice:
 - a. Be licensed in all jurisdictions in which they work; or
 - b. If the state in which they work have adopted an in-house counsel registration rule, register and be compliant of that rule. Generally, lawyers in those states have a short window of time to register as in-house counsel. They are then permitted to provide legal services to the corporate employer.

Appendix

A. **ABA Model Rule 5.7: Responsibilities Regarding Law-related Services**

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_7_responsibilities_regarding_law_related_services.html

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph

(b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

B. **ABA Model Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law** (in part)

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law.html

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to

appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

C. New Jersey Disciplinary Rules of Professional Conduct – RPC 5.5(b)

https://www.law.cornell.edu/ethics/nj/code/NJ_CODE.HTM

“(b) A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:

(1) the lawyer is admitted to practice pro hac vice pursuant to R. 1:21-2 or is preparing for a proceeding in which the

lawyer [reasonably](#) expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or

(2) the lawyer is an in-house counsel and complies with R. 1:27-2; or

(3) under any of the following circumstances:

(i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer’s representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program, the representation is on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice; or

(iv) the lawyer practices under circumstances other than (i) through (iii) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client."

D. New York Judiciary Law § 470

<http://codes.findlaw.com/ny/judiciary-law/jud-sect-470.html>

A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state.